Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 75-524

HYSTER COMPANY,

Petitioner,

v.

EMPLOYEES ASSOCIATION OF KEWANEE, et al.,

Respondents,

and

HYSTER COMPANY,

Petitioner,

v.

INDEPENDENT TOWING AND LIFTING MACHINE ASSOCIATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SABIN, NEWCOMB, SABIN & MEYER
VERNE W. NEWCOMB
JAMES B. RUYLE
1111 Wilcox Building
Portland, Oregon 97204
Attorneys for Petitioner Hyster Company

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-75

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE INTERPRETATION OF BOYS MARKETS, INC. v. RETAIL CLERKS UNION.	7
2. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT.	15
3. IMPORTANCE OF THE QUESTION PRESENTED.	18
CONCLUSION	19
APPENDIX A	A1
APPENDIX B	B1
APPENDIX C	C1

TABLE OF CASES

	Page
A.G.C. of Minn. v. Construction & General Laborers Local 563 ____ F.2d ____, 77 LC ¶11,039 (8th Cir. 1975)	11
Amstar Corp. v. Amalgamated Meatcutters and Butcher Workmen 468 F.2d 1372 (5th Cir. 1972)	8, 9, 12, 16
Armco Steel Corp. v. Dist. 17 UMWA 505 F.2d 1129 (4th Cir. 1974)	10, 13
Boys Markets, Inc. v. Retail Clerks Union 398 U.S. 235, 90 S. Ct 1583 (1970)	2, 7, 8, 9, 15, 16, 17, 18
Buffalo Forge Co. v. United Steelworkers 517 F.2d 1207 (2d Cir. 1975)	9
Gary Hobart Water Corp. 210 NLRB No. 87 (1974)	10, 17
Gary Hobart Water Corp. v. NLRB 511 F.2d 284 (7th Cir. 1975)	10, 12. 13, 17
Gateway Coal Co. v. UMWA 414 U.S. 368 (1974)	12, 16
Inland Steel Co. v. Local 1545 UMWA 505 F.2d 293 (7th Cir. 1974)	10, 12, 13
Island Creek Coal Co. v. UMWA 507 F.2d 650	10
Monongahela Power Co. v. Local 2332, IBEW 484 F.2d 1209 (4th Cir. 1973)	9, 10, 12
NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926 502 F.2d 321 (3d Cir. 1974) cert. denied No. 74-419, 1974 Term	10, 11, 12
Northwest Airlines, Inc. v. ALPA 442 F.2d 251 (8th Cir. 1971)	11
Pilot Freight Carriers, Inc. v. Teamsters 497 F.2d 311 (4th Cir. 1974)	10
Textile Workers Union of America v. Lincoln Mills 353 U.S. 448 (1957)	7, 15
United Steelworkers v. Warrier and Gulf Navigation Co 363 U.S. 574 (1960)	7-8, 17
Valmac Industries, Inc. v. Food Handlers Local 425 ____ F.2d ____, 77 LC ¶11,039 (8th Cir. 1975)	11
Wilmington Shipping Co. v. Local 1426, ILA, ____ F.2d ____, 74 LC ¶10,129 (4th Cir. 1974), cert. denied No. 74-288, 1974 Term.	10

STATUTES

	Page
Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. §185(a) 3	3
Norris-LaGuardia Act Section 2, 47 Stat. 70, 29 U.S.C. §102 (1932) 3, 14	3
Norris-LaGuardia Act Section 4, 47 Stat. 70, 29 U.S.C. §104 (1932) 3	3, 14
Norris-LaGuardia Act Section 8, 47 Stat. 72, 29 U.S.C. §108 (1932) 3, 14	3

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INDEPENDENT TOWING AND LIFTING MACHINE ASSOCIATION, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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The petitioner, Hyster Company, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered

in this proceeding on July 7, 1975.[1]

OPINION BELOW

The opinion of the court of appeals, below, has not yet been reported and appears herein as Appendix A. The trial court, the United States District Court for the Southern District of Illinois, Northern Division, rendered no opinion.

JURISDICTION

The judgment of the court of appeals was dated July 7, 1975. The jurisidiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the injunctions were improperly ordered by the United States District Court, under the doctrine of Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), where the respondent unions had caused the work stoppages by ordering employees not to cross another union's picket lines, by threatening to levy fines,

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1. The titles of these cases, as amended in the trial court, were as follows: "Hyster Company, a corporation, v. Employees Association of Kewanee, an unincorporated association, Bud Van Stechelman, Frederick F. Fleming, Sr., Dean Hewitt, Gary Roberson, and John Does One through Twenty, officers and agents of the above unincorporated association and employees of Hyster Company," Civil No. P-CIV-74-151, and "Hyster Company, a corporation, v. Independent Towing and Lifting Machine Assocation, an unincorporated association, William Fritz, Richard Prather, Tom Metz, Robert Doerr, Sr., Harold Cochran, Milan F. Garrett, Robert Merrill, Dean Adams, and John Does One through Twenty, officers and agents of the above unincorporated association and employees of Hyster Company," Civil No. P-CIV-74-152.

and by actual participation in the picketing, and where the applicable labor contracts contained no-strike and arbitration provisions covering all differences, disputes or controversies,

STATUTORY PROVISIONS INVOLVED

This case involves Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185(a), and Sections 2, 4 and 8 of the Norris-LaGuardia Act, 47 Stat. 70, 72, 29 U.S.C. §§ 102, 104 and 108 (1932). These provisions are appended as Appendix B.

STATEMENT OF THE CASE

The facts are not in dispute inasmuch as the respondents declined to present any evidence in the district court and have filed no answers to the complaints.

The jurisdiction of the district court was invoked under the Labor Management Relations Act, 1947, § 301(a), 29 U.S.C. § 185(a).

The district court, following a show cause hearing, granted petitioner, Hyster Company, a preliminary injunction in each case against work stoppages which were in breach of no-strike agreements. The work stoppages had occurred

at two Hyster plants, one in Peoria, Illinois, involving about 390 hourly employees, and the other in Kewanee, Illinois, involving some 500 shop and office employees (Tr. 13, 24).

The labor contracts in effect at these plants between Hyster Company and the respondent unions contained similar no-strike and arbitration provisions which broadly prohibited any work stoppage and committed all differences, disputes or controversies to the grievance/arbitration procedure. These provisions are quoted in Appendix C.

The work stoppages at the Peoria and Kewanee plants were timed with an end-of-contract strike at Hyster's Danville, Illinois, plant. However, unlike typical sympathy strikes, they were carried out by the active participation of the respondent unions and their representatives and were part of an on-going conspiracy between all three unions to strike all three of the plants each time the contract of one of them expired. Similar co-ordinated strikes had been carried out previously (Tr. 5, 7, 40-41).

Advance indications that the Danville strike would extend to Peoria and Kewanee began to appear in the month preceding the strikes. On October 6 or 7, 1974, a notice was posted by the Independent Towing and Lifting Machine Association on its bulletin board at the Peoria

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2. Transcript references are to the hearing of November 18, 1974.

plant reading as follows:

> "By resolution passed at the September Union Meeting, any member of the I.T.L.M.A. that crosses a picket line without proper union authorization established by the I.T.L.M.A., the I.L.T.B.U. of Danville or the Employers (sic) Association of Kewanee will be assessed a fine of $100 per day or $100 per incident." (Tr. 14; P. Ex. 1).

According to the union's counsel, the three unions are "more or less sister locals," and this resolution was adopted because "they don't want each other crossing picket lines set up by another union." (Tr. 34).

Later, on October 21 and several times thereafter, Bud Van Stechelman, president of the Employees Association of Kewanee, notified Walter Lemansky, Hyster's industrial relations manager at the Kewanee plant, that Danville pickets appearing in Kewanee would mean a work stoppage by the Kewanee employees (Tr. 25).

Again, shortly before the commencement of the work stoppage in Kewanee, Van Stechelman announced on the radio that, should Danville send pickets, Kewanee employees would honor them (Tr. 33).

In Peoria, union representatives Dean Adams and Dick Prather likewise told Peoria employees not to cross picket lines there (Tr. 21).

Accordingly, prior to 7:00 a.m. on November 14, 1974, pickets from Hyster's Danville plant appeared at the Peoria

and Kewanee plants, and the work stoppages under question commenced at both plants at 7;00 a.m. (Tr. 14, 19, 24, 29).

In the course of picketing at the Peoria plant, officers of the Independent Towing and Lifting Machine Association continuously stationed themselves near the Danville pickets (Tr. 16, 17). At Kewanee, two officers of the Employees Association of Kewanee and a Kewanee employee physically participated in the picketing by blocking or channeling employees attempting to report for work (Tr. 25, 27). In further substantiation of his control over the work stoppage, union president Van Stechelman told industrial relations manager Lemansky, in the presence of two other union officers, that Van Stechelman would not let any employees cross the picket line if Lemansky could not guarantee preparation of the employees' paychecks in accordance with Van Stechelman's dictates (Tr. 27-28, 32).

The immediate effects of these work stoppages were to imperil Hyster's deliveries to the U.S. Government and into foreign trade, to cut off the substantial payroll and purchasing from the communities of the plants involved, to throw hundreds of employees out of work, and to jeopardize Hyster's good will and risk the permanent loss of customers to other suppliers, all over and above the great daily cost of maintaining the plants involved without the benefit of their production (Affidavit of Wm. H. Kilkenny, and Tr. 19 and 29).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Conflicts with the Decisions of Other Courts of Appeals Regarding the Interpretation of Boys Markets, Inc. v. Retails Clerks Union.

The court of appeals has impliedly acknowledged that this case is ripe for review by the Supreme Court. In its opinion, the court noted that its decision was in conflict with that of other courts of appeals, and announced that the opinion was being circulated among all judges of the court "... in view of the possible inconsistency between our holding and those of certain other circuits." (Appendix A, A6 n.3).

In Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), the Supreme Court held that a strike in breach of a contractual no-strike clause could be enjoined in a Section 301, Labor Management Relations Act suit if it was within the terms of a mandatory grievance/arbitration procedure and if traditional equitable considerations were satisfied. Id. at 253-254. In that case, the Court, citing the Lincoln Mills and Steelworkers Trilogy decisions, stressed the importance of resolving labor disputes through the arbitration process, and forewarned that the unavailability of the injunction remedy would discourage employers from entering into the arbitration arrangements favored by federal policy. Id. at 242-243, 247, 248.

As to the question of arbitrability, the Court had earlier held, in United Steelworkers v. Warrior and Gulf Navigation Co.,

363 U.S. 574 (1960) at 581,

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement...."

The Court added that a dispute should be found arbitrable unless it can be said "with positive assurance" that the arbitration clause does not cover the dispute. "Doubts should be resolved in favor of coverage." Id. at 582-583.

Subsequent to the Boys Markets decision, several courts of appeals, including the Seventh Circuit in the decision below, have split over the application of the Boys Markets doctrine to work stoppages precipitated by the observance of stranger unions' picket lines. At the outset, it should be noted that the respondent unions in the instant case actively participated in the work stoppages, thus making the stoppages their own, so that the strikes in question were not merely sympathy strikes.

One of the points of contention between the circuits is whether the Boys Markets decision literally requires, precedent to an injunction, that a dispute be "over a grievance" in the ordinary sense, as opposed to being a disagreement of a broader nature. The Fifth Circuit originated the debate in Amstar Corp. v. Amalgamated Meatcutters and Butcher Workmen, 468 F.2d 1372 (5th Cir. 1972), by holding that a sympathy work stoppage was not "over a grievance"

subject to arbitration. So deciding, the court did not discuss the contractual arbitration or no-strike language involved.

The Amstar doctrine was followed recently by the Second Circuit in Buffalo Forge Co. v. United Steelworkers, 517 F.2d 1207 (2d Cir. 1975). There, the court held Boys Markets to require that the dispute be "over a grievance." Id. at 1210. The court noted the "divergent authority" on the subject, however. Id. at 1209.

Opposing this view, the Third, Fourth and Eighth Circuits, in the following cases, have held sympathy strikes to be enjoinable, under the Boys Markets doctrine, where the relevant arbitration and no-strike provisions were sufficiently broad. In their decisions, these courts discussed the federal policy favoring arbitration and analyzed the contractual provisions involved, in conformity with Boys Markets, rather than overlooking these considerations as was done in Amstar and Buffalo Forge.

The Fourth Circuit rendered one of the most prominent of these decisions in Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973). In that case, the court held that "The wording of a particular arbitration agreement is an important factor in determining questions of coverage," and acknowledged that all doubts should be resolved in favor of arbitration. Id. at 1213. The arbitration language was similar to that in the instant case in covering "any dispute." Id. at 1210.

Following the Monongahela decision, the Fourth Circuit allowed injunctions

in Pilot Freight Carriers, Inc. v. Teamsters, 497 F.2d 311, cert. denied, (No. 74-48, 1974 Term), Wilmington Shipping Co. v. Local 1426, ILA, 74 LC ¶10,129, No. 73-2354 (4th Cir. June 19, 1974), cert. denied (No. 74-288, 1974 Term), and Armco Steel Corp. v. Dist. 17 UMWA, 505 F.2d 1129, petition for cert. filed (No. 74-1574, June 13, 1975).

In these cases, the Fourth Circuit reiterated its holding in Monongahela that the refusal to cross a picket line was an arbitrable dispute, adding, in Pilot that the question whether the union directed or influenced the refusal was arbitrable. Id. at 313. That question is featured in the instant case.

In Armco, moreover, the court held that Gary Hobart Water Corp., 210 NLRB No. 87 (1974), presented no impediment to injunctive relief. Id. at 1133. This conclusion underscores the conflict among the circuits, for Gary Hobart, affirmed in Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir. 1975), was the Seventh's Circuit's chief reliance for vacating the injunction herein (Appendix A, A).

The Third Circuit followed Monongahela, supra, in NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, 502 F.2d 321, cert. denied (No. 74-419, 1974 Term). Later, in Island Creek Coal co. v. UMWA, 507 F.2d 650, petition for cert. filed (No. 74-1573, June 13, 1975), that court again upheld an injunction, citing the nearly parallel case of Inland Steel Co. v. Local 1545 UMWA 505 F.2d 293 (7th Cir. 1974), decided by the Seventh Circuit before its decision herein.

On July 29, 1975, the Eighth Circuit followed the same doctrine in Valmac Industries, Inc. v. Food Handlers Local 425, ___ F.2d ____, 77 LC ¶11,039 (No. 74-1660), and in A.G.C. of Minn. v. Construction & General Laborers Local 563, ___ F.2d ___, 77 LC ¶11,047 (Nos. 74-1273 and 1334), an inclination the court had shown earlier in Northwest Airlines, Inc. v. ALPA, 442 F.2d 251 (8th Cir. 1971).

In Valmac, supra, the Eighth Circuit initially acknowledged the split of authority on this subject. Id. at 77 LC ¶11,039, p. 19,526. The court then went on to hold that:

> "[I]t makes little sense to argue that because the work stoppage precipitated the dispute it was not a work stoppage 'over' a grievance which the parties were contractually bound to arbitrate. We think the holdings in NAPA and Monongahela and their progeny are consistent with a congressional purpose to encourage settlement of disputes by arbitration, including situations in which purported exceptions to a no-strike clause under the collective bargaining agreement are in dispute. Injunctive relief, conditioned upon prompt arbitration of the dispute, does not nullify the union's right to establish or honor a picket line; it 'only suspends the exercise of the right until its existence is established

by an arbitrator's decision.' NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926, supra, 502 F.2d at 324." Id. at 77 LC ¶11,039, p. 19,527.

Against this background of divergent authority, the Seventh Circuit stands in an ambivalent position. In October, 1974, it upheld an injunction against the honoring of stranger picket lines in Inland Steel Co. v. Local 1545 UMWA, supra. Perhaps the court felt compelled to do so under the decision of Gateway Coal Co. v. UMWA, 414 U.S. 368 (1974), which involved identical contract language and a safety dispute not governed by the contract.

In Inland, the court refused to express an opinion on the opposing Amstar and Monongahela doctrines. Id. at 299.

Later, in February, 1975, the Seventh Circuit enforced a National Labor Relations Board decision in Gary Hobart Water Corp. v. NLRB, supra, which the court found to be controlling in the instant case. The issue in Gary Hobart, as framed by the court, was whether employees were engaged in protected activities under the National Labor Relations Act when honoring another union's picket line and participating in a sympathy strike. Id. at 285-286.

Holding that a sympathetic strike was protected unless clearly and unmistakably waived in the contract, the court went on to find that the no-strike language lacked express reference to sympathy picketing and that the arbitration language, which was limited to disputes under the terms of the

contract, was too narrow to encompass sympathy work stoppages. Thus, the court found that the employees had not clearly and unmistakably waived the statutory right to honor the picket lines of other unions and that their discharge for doing so, therefore, was discriminatory. As an afterthought, the court mentioned perhaps the most significant consideration, namely, that the National Labor Relations Board had previously deferred the case to the arbitration procedure and had only found violations after the employer had subsequently refused to arbitrate. Id. at 289.

The Seventh Circuit relied on Gary Hobart in deciding the case at bar. It conceded that the arbitration language herein was broader than that in Gary Hobart, but found it narrower than the exceptionally broad language involved in Inland Steel. Appendix A, A4-5. Further, while nominally recognizing the presumption in favor of arbitrability, the court discarded that guideline by applying to the instant contract language the "clear and unmistakable waiver" test. Appendix A, A5. Thus, while acknowledging that this case is contractual while Gary Hobart was statutory, the court failed to perceive the relevance of that distinction.

As mentioned earlier, the Seventh Circuit, by grounding this case on Gary Hobart, placed itself directly at odds with the Fourth Circuit which, in Armco Steel Corp. v. Dist. 17 UMWA, supra, found Gary Hobart to be no impediment to injunctive relief. Nonetheless, the Seventh Circuit did recognize its decision to be a possible inconsistency with that of other circuits. Appendix A, at A6 n.3.

In summary, six courts of appeals, to date, are sharply divided over the interpretation of one of the most significant doctrines of labor law handed down by this Court.

Of the cases reviewed by these courts thus far, this case presents the classic illustration of how the abuses sought to be curbed by the Norris-LaGuardia Act can, instead, be advanced by the literal application of that legislation. Specifically , whereas the public policy as stated in Section 2 of the Norris-LaGuardia Act (Appendix C) was to protect the unorganized worker from employer oppression, here the respondent unions have made a mockery of their organization by by flaunting it, in violation of their no-strike pledges, whenever any one of the unions seeks economic support. Likewise, whereas Section 8 of the Norris-LaGuardia Act denies injunctive relief to any complainant "... who has failed to make every reasonable effort to settle such dispute either by negotiation ... or voluntary arbitration," here the unions seeking the protection of the Norris-LaGuardia Act occupy the role of the offending party in that section.

Also notable about this case, among those heard to date by the courts of appeals, is the respondent unions' sponsorship of the work stoppages. Unlike the other cases, where respectable arguments could be made that the unions and their members had passively honored other unions' picket lines, the respondent unions herein directly hosted the picketing and promoted the work stoppages, actually requiring their members to honor the picket lines under threats of fines. This cannot be the kind of

conduct sought to be protected by the Norris-LaGuardia act.

Finally, the instant case is notable for contract language which flatly proscribes all work stoppages, picketing and the like, and commits "all differences, disputes, or controversies" to the grievance and arbitration process. Unlike many of the contract provisions considered by the courts of appeals, this language is unconfused by clauses permitting the honoring of picket lines. Too, the disputes subject to arbitration are not restricted to those dealing solely with interpretation of terms of the contract. To the contrary, the contract provisions in question would seem fully to satisfy the criteria set out in Boys Markets. Nonetheless, these provisions have been greatly discredited by the decision of the court below.

2. The Decision of the Court of Appeals Conflicts with Decisions of the Supreme Court.

In Boys Markets, Inc. v. Retail Clerks Union, supra, this Court repeatedly emphasized the importance of the federal policy favoring arbitration, stressing the "devastating implications" for enforceability of arbitration agreements and no-strike obligations if equitable remedies are not available. Id. at 247. In so doing, the Court repeated its "consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration," citing the earlier cases of Textile Workers Union of America v. Lincoln Mills and the Steelworkers Trilogy, supra. Id. at 241.

Despite these admonitions, the Seventh Circuit has here effectively opted in favor of industrial strife instead of arbitration. To reach this result, it has relied partially on the notion that the labor dispute precipitating the work stoppages was not "over a grievance" in the literal sense, citing Amstar Corp. v. Amalgamated Meatcutters, supra. Appendix A, A5. In using that language in Boys Markets, however, the Supreme Court was not faced with the issue of the nature of the labor dispute but seemed to be referring, instead, to the traditional equitable elements requisite to the issuance of an injunction. Boys Markets, supra, at 254. On the other hand, the Court, in Boys Markets, expansively discussed the policies in favor of arbitration.

Respecting the "grievance" element, the Supreme Court has held, in Gateway Coal Co. v. UMWA, supra, that the presumption of arbitrability is not limited to "wages, hours, seniority, vacations and other economic matters." 94 S. Ct. 629, 636. In that case, the Court went on to hold that an interpretational question whether the union was required to submit an issue to a vote of its membership precedent to calling employees off the job was subject to arbitration. That question, however, was hardly the subject of a "grievance" as conceived of by the Seventh, Fifth, and Second Circuits under the Boys Markets doctrine. To the contrary, it was a procedural question affecting the union's right to strike, much like the question herein whether, prior to exhausting the grievance/arbitration procedures, the respondent unions may cause work stoppages.

Besides the "grievance" question the Seventh Circuit here found that the contractual arbitration language did not cover the labor dispute. In so finding, it rested on its recent conclusion in Gary Hobart Water Corp. v. NLRB, supra, that the waiver of the right to honor a stranger union's picket line must be in clear and unmistakable language. Appendix A, A5. That criterion, however, is directly contrary to the criterion for arbitrability prescribed by the Supreme Court. In United Steelworkers of America v. Warrior and Gulf Navigation Co., supra, this Court held that arbitrability should not be denied unless it can be said with "positive assurance" that the arbitration clause is not susceptible of such an interpretation, and that "doubts should be resolved in favor of coverage." Id. at 582 to 583. More particularly, the Court there held, as quoted above, that all questions not specifically excluded must come within the scope of the grievance and arbitration provisions. Id. at 581.

Thus, the court of appeals erroneously applied the "clear and unmistakable" test, which might be applicable to statutory cases such as Gary Hobart, rather than resolving its doubt in favor of arbitrability, as this Court has directed. The effect was to apply exactly the opposite criterion than that prescribed by this Court, thereby militating against rather than in favor of the presumption of arbitrability.

Finally, the court of appeals chose to apply its narrow view of the Boys Markets doctrine to a case in which the respondent unions had not passively observed a third party's picket line but, rather,

had actively hosted and participated in the picketing, even threatening their members with sanctions for crossing the picket lines. Under these circumstances, it is fantasy to theorize that there is no dispute between the respondents and Hyster. Patently, the respondent unions joined the dispute of the Danville union, knowing that doing so would accrue to their own economic benefit in future bargaining, as their attorneys explained in the district court (Tr. 36). Surely the Supreme Court did not intend to exclude this brash breach of contract from the ambit of Boys Markets by the phrase "over a grievance," to the detriment of the salubrious policies underlying that decision.

3. Importance of the Question Presented.

Review by the Supreme Court of the question presented herein is urgently needed to unify the conflicting authority now extant. Considering the present division among the circuits, the implication of a denial of this writ of certiorari would be that the same facts will produce a different brand of justice -- even for different employees of the same employer -- depending on the forum involved.

The conclusion of the court of appeals below that a Boys Markets injunction is not available where the labor dispute is not "over a grievance" attaches a major exception to the Boys Markets doctrine which will undermine the very policies fostered by that doctrine. This exception covers not only all situations in which a strike is coordinated with the strike of another union. In addition, as this case

particularly demonstrates, any local union barred from striking by a contractual no-strike clause can immunize an otherwise illegal work stoppage by simply arranging for "sympathy pickets" from some other local. Therefore, the exception carved out by the court of appeals can be expected to have a wide-ranging effect in threatening the labor peace and stability fostered by the use of no-strike commitments. In turn, the effect will be to discourage employers from entering arbitration agreements and to undermine the Federal policy favoring arbitration.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

SABIN, NEWCOMB, SABIN & MEYER
VERNE W. NEWCOMB
JAMES B. RUYLE
1111 Wilcox Building
Portland, Oregon 97204

Attorneys for Petitioner

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 75-1066 and 75-1068

HYSTER COMPANY, a corporation,
Plaintiff-Appellee,

vs.

INDEPENDENT TOWING AND LIFTING MACHINE ASSOCIATION, *et al.*,
Defendants-Appellants.

and

HYSTER COMPANY, a corporation,
Plaintiff-Appellee,

vs.

EMPLOYEES ASSOCIATION OF KEWANEE, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division
Nos. P-Civ 74-152 and P-Civ 74-151
ROBERT D. MORGAN, *Judge.*

ARGUED MAY 28, 1975 — DECIDED JULY 7, 1975

Before TUTTLE, *Senior Circuit Judge,** TONE and BAUER, *Circuit Judges.*

TONE, *Circuit Judge.* These consolidated appeals are from two related orders enjoining the defendant unions

* Senior United States Circuit Judge Elbert Parr Tuttle of the United States Court of Appeals for the Fifth Circuit is sitting by designation.

and their members from engaging in work stoppages which resulted from refusals to cross a stranger union's picket lines. The issues in each appeal is whether the conduct enjoined gave rise to an arbitrable issue under the collective bargaining agreement between the union and the plaintiff employer, and therefore fell within the exception to the anti-injunction provision of the Norris-LaGuardia Act established by *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970). We hold that the *Boys Markets* exception does not apply and therefore reverse the orders of the District Court.

Plaintiff Hyster Company, which is engaged in the manufacture and sale of industrial trucks and construction equipment, has plants in Peoria, Kewanee, and Danville, Illinois. The hourly employees at the Peoria plant are represented by defendant Independent Towing and Lifting Machine Association. Another union, the defendant Employees Association of Kewanee, represents the shop and office employees at the Kewanee plant. The employees at the Danville plant are represented by still another independent union which is not a party to these proceedings, but whose picketing led to the dispute in issue here.

Each of the defendant unions is a party to a separate collective bargaining agreement with the plaintiff. The agreements contain similar arbitration and no-strike provisions, the pertinent details of which will be described later.

When the collective bargaining agreement between plaintiff and the independent union at the Danville plant expired, the employees at that plant went out on strike and picketed plaintiff's Peoria and Kewanee plants. The Peoria and Kewanee unions and their employees honored the picket lines. Plaintiff then filed separate actions under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, against the Peoria and Kewanee unions and their officers and agents to enjoin the work stoppages. The District Court entered temporary injunctions on the basis of affidavits and, following a hearing, entered preliminary injunction orders enjoining the defendants from engaging in the work stoppages. These appeals followed.

Two recent opinions of this court are pertinent. The company relies on *Inland Steel Co.* v. *Local Union No. 1545, United Mine Workers of America,* 505 F.2d 293 (7th Cir. 1974). Defendants rely on *Gary Hobart Water Corp.* v. *N.L.R.B.,* 511 F.2d 284 (7th Cir. 1975), in which the court distinguished *Inland Steel* on the basis of the differing language of the arbitration clauses in the two cases. In *Inland Steel,* the issue of a sympathy strike was held by a divided court to be within the scope of the "exceptionally broad" (505 F.2d at 298) arbitration clause of the bargaining agreement,[1] which covered, not only (1) "differences . . . as to the meaning and application of the provisions of this agreement," but also (2) "differences . . . about matters not specifically mentioned in this agreement" and (3) "any local trouble of any kind . . . at the mine." (505 F.2d at 297, n. 5.) Thus, although the contract did not contain a no-strike clause, one was implied on the authority of *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 380-384 (1974), and the judgment of the district court granting the injunctions was affirmed.

In contrast, in *Gary Hobart,* the arbitration clause applied only to "any and all disputes and controversies arising under or in connection with the terms or provisions" of the bargaining agreement, and, as the court specifically noted (511 F.2d at 288), did not contain provisions comparable to those in the *Inland Steel* arbitration clause which are designated (2) and (3) in the preceding paragraph. The court concluded that the "no-strike" clause of the contract, although it stated that "there shall be no lockouts by the Company and there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members," did not constitute a waiver by the Union or the employees of "their right to engage in a sympathy strike." (511 F.2d at 287, 288.) The court summarized its holding as follows:

> "The refusal to dishonor another local union's picket line or engaging in a sympathy strike in connection

[1] The agreement in issue was the National Bituminous Coal Wage Agreement of 1971. Identical language of the predecessor 1968 agreement was before the Supreme Court in *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 374-376 (1974).

> with another local's strike are not disputes or controversies arising under or in connection with the first local union's agreement and are therefore neither arbitrable nor subject to the no-strike provision." 511 F.2d at 288.[2]

The arbitrability issue in *Gary Hobart* arose in the context of an unfair labor practice proceeding, but it was nevertheless determined by the language of the arbitration clause, as was the determination of that issue in *Inland Steel,* and the court in the *Gary Hobart* opinion treated *Inland Steel* as being applicable precedent unless it was distinguishable.

In the instant case, the grievance and arbitration procedures of the two collective bargaining agreements in question are substantially the same and apply, in the language of the Peoria contract, to "[a]ll differences, disputes, or controversies which arise between the Union, the Company or any employee covered by this Agreement and the Company." The agreements also contain "no-strike" clauses, of which the Peoria language is representative:

> "The Union will not authorize, sanction, condone, promote or instigate any strike, work stoppage, sit-down, slow down, picketing or curtailment of work or interference with the efficient operation of the Company's plant or premises during the term of this Agreement."

Absent from the arbitration clauses in this case are any provisions comparable to the "differences . . . about matters not specifically mentioned in this agreement" and the "any local trouble of any kind . . . at the mine" provisions of the *Inland Steel* arbitration clause. Although the definitions before us (disputes "which arise between the Union, the Company or any employee covered by this Agreement and the Company") lack the specific limiting language present in *Gary Hobart,* they are closer

[2] Accord, *Amstar Corp.* v. *Amalgamated Meat Cutters & B. Workmen,* 468 F.2d 1372, 1373 (5th Cir. 1972). *Contra: NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Local 926,* 502 F.2d 321, 324 (3d Cir. 1974) (Judge Hunter dissenting, in a dissent relied upon by Judge Fairchild in his dissent in *Inland Steel,* 505 F.2d at 301); *Monongahela Power Co.* v. *Local No. 2332, IBEW,* 484 F.2d 1209 (4th Cir. 1973); and *cf. Northwest Airlines, Inc.* v. *Air Lines Pilots Ass'n,* 442 F.2d 251 (8th Cir. 1971).

to the definition in that case than to the one in *Inland Steel.* We recognize of course the presumption in favor of arbitrability. *Gateway Coal Co.* v. *Mine Workers, supra,* 414 U.S. at 377-380. But there are also present not only the competing Norris-LaGuardia Act policy against labor injunctions, to which *Boys Markets* creates a very limited exception, but also the fact that the work stoppage "was not 'over a grievance' which the parties were contractually bound to arbitrate" but rather "itself precipitated the dispute." *Cf. Amstar Corp.* v. *Amalgamated Meat Cutters & B. Workmen,* 468 F.2d 1372, 1373 (5th Cir. 1972), and Judge Fairchild's dissent in *Inland Steel,* with which compare the majority's reference to *Amstar* in *Inland Steel,* 505 F.2d at 299. Moreover, the waiver of a collective bargaining right must be in "clear and unmistakable language." *Gary Hobart Water Corp.* v. *N.L.R.B., supra,* 511 F.2d at 287, quoting from *N.L.R.B.* v. *Wisconsin Aluminum Foundry Co.,* 440 F.2d 393, 399 (7th Cir. 1971) (which in turn takes the phrase from a line of Sixth Circuit cases, including *Beacon Journal Publishing Co.* v. *N.L.R.B.,* 401 F.2d 366, 367 (6th Cir. 1968)). We are unable to find in the agreements before us that which *Gary Hobart* holds is essential if a union and its members are to be denied the right to honor a stranger union's picket lines and thereby engage in a sympathy strike, *viz.,* "clear and unmistakable language waiving [the] right to engage in such a strike." (511 F.2d at 287, 288.) Since there was no waiver and the dispute was not arbitrable, a *Boys Markets* injunction could not properly be issued.

Plaintiff's attempts to distinguish *Gary Hobart* are without substance. We have already observed that, although *Gary Hobart* was an unfair labor practice proceeding, the court in that case recognized the applicability of *Inland Steel* and distinguished that case solely on the basis of the different language of the arbitration clauses in the two cases. Nor can *Gary Hobart* be distinguished on the ground that the union, as distinguished from the employees, did not participate in the work stoppage in that case. Although the opinion does not set forth the union's role in the work stoppage, no point of any distinction between the union and its employees is made by the court in distinguishing *Inland Steel.* Finally, the statement by the court in *Gary Hobart* of additional

grounds which would have required the same result if the agreement had made the honoring of a stranger union's picket lines and sympathy strikes arbitrable is not a basis for distinction, for "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

In view of our holding that the *Boys Markets* exception does not apply, we need not reach defendants' contention that even if the *Boys Markets* exception were applicable, the procedural requirements of section 7 of the Norris-LaGuardia Act (29 U.S.C. § 107), including verification of the complaint, adequate notice to all defendants, and establishment of all the elements of plaintiff's case by testimony in open court, must be, but were not, complied with. Nor need we reach other points urged by defendants.

The orders appealed from are reversed and the cases are remanded with directions to dismiss the actions.[3]

REVERSED AND REMANDED.

[3] This opinion has been circulated among all judges of this court in regular active service, in view of the possible inconsistency between our holding and those of certain other circuits. See note 2, *supra*. A majority voted not to rehear the case in banc.

USCA 4159—The Scheffer Press, Inc., Chicago, Illinois—7-7-75—250

APPENDIX B

Norris-LaGuardia Act §2

29 U.S.C. §102 (1932)

§ 102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Norris-LaGuardia Act §2

29 U.S.C. §104 (1932)

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

APPENDIX B

Norris-LaGuardia Act §2

29 U.S.C. §108 (1932)

§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

APPENDIX B

Labor Management Relations
Act, 1949, §301(a),

29 U.S.C. 185(a)

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APPENDIX C

Contract Provisions

The Peoria Contract:

"ARTICLE XII

STRIKES

Section 1. The Union will not authorize, sanction, condone, promote or instigate any striek, work stoppage, sitdown, slow down, picketing or curtailment of work or interference with the efficient operation of the Company's plant or premises during the term of this Agreement. The Company agrees that the Union will not be held responsible or liable for any act described in the preceding sentence of this Section 1, which is not authorzed, sanctioned, condoned, promoted or instigated by the Union.

* * * * *

ARTICLE III

GRIEVANCE PROCEDURE

Section 1. All differences, disputes, or controversies which arise between the Union, the Company or any employee covered by this Agreement and the Company, which are presented to the Company within ten scheduled working days of the occurrence of the action or situation which gave rise thereto, shall be adjusted in the following manner:

* * * * *

STEP 3. ... Within ten scheduled working days after a request has been made, if the dispute has not yet been settled, the dispute shall, at the election of either party to this Agreement, be submitted for settlement by an Arbitrator to be selected from a list or lists supplied by the American Arbitration Association, within 15 days from the demand for Arbitration. The arbitrator shall meet to hear the matter in dispute within 15 scheduled working days after this designation and shall render his decision within 20 scheduled working days from the close of the meeting with respect to the grievance. Either party to this Agreement may call witnesses and present testimony before the Arbitrator, provided that witnesses other than the aggrieved employee or employees will be excluded from the meeting room when not testifying. The Arbitrator shall have no power to add to, subtract from, change or modify any provision of this Agreement. The Arbitrator's decision shall be final and binding upon all parties. The cost of the Arbitration shall be borne in equal shares by the Company and the Union."

The Kewanee Contract:

"ARTICLE VI

STRIKES AND LOCKOUTS

During the term of this Agreement, there shall be no lockout by the Company nor any strike, slowdown, or interruption in production due to a labor dispute either by the Union or any employee. The Company agrees that the Union will not be held responsible

for and will not be liable for any slowdown, interruptions, or strike by an employee who is not a member of the Union or by an employee who is a member where such act has not been encouraged, authorized, or approved by the Union. The Union on its part recognizes the right of the Company to discipline any employee or group of employees who participate in or actively promote unauthorized slowdown, interruptions, or strikes.

ARTICLE VII

GRIEVANCE PROCEDURES

1. All differences, disputes, or controversies which arise between the parties hereto, or any employee covered by this Agreement and the Company, which are presented to the Company within five scheduled working days of knowledge by the Union or the employee of the occurrence of the action or situation, which gave rise thereto, shall be adjusted in the following manner:

* * * * *

STEP 4. ... In the event that an agreement is not reached before the expiration of the time limit, the dispute shall, at the election of either party to this Agreement, be submitted for settlement by an Arbitration Board of three arbitrators consisting of one person respresenting the Company, one person representing the Union, and a third disinterested person who shall be selected by agreement of the two arbitrators designated by the parties to this Agreement. ... The concurrence of two of the three arbitrators

shall be necessary to a decision. Such decision shall be final and binding upon all parties. The cost of the third arbitrator and other administrative expenses of arbitration shall be borne in equal shares by the Company and the Union."